

STATE OF TEXAS
DEPARTMENT OF INFORMATION RESOURCES

CONTRACT FOR
MANAGED SERVICES FOR INFORMATION TECHNOLOGY

INTERNATIONAL BUSINESS MACHINES CORPORATION

1. Introduction

A. Parties

This Contract for services is entered into between the State of Texas, acting by and through the Department of Information Resources (hereinafter “DIR”) with its principal place of business at 300 West 15th Street, Suite 1300, Austin, Texas 78701, and International Business Machines Corporation (hereinafter “Vendor”), with its principal place of business at 1 New Orchard Road, Armonk, New York 10504.

B. Compliance with Procurement Laws

This Contract is the result of compliance with applicable procurement laws of the State of Texas. DIR issued a solicitation on the Texas Building and Procurement Commission’s Electronic State Business Daily, Request for Offer (RFO) DIR-SDD-TMP-091, on December 8, 2006, for Managed Services for Information Technology. Upon execution of this Contract, a notice of award for RFO DIR-SDD-TMP-091 shall be posted by DIR on the Electronic State Business Daily.

C. Order of Precedence

This Contract; Appendix A, Standard Terms and Conditions For Services Contracts; Appendix B, Vendor’s Historically Underutilized Businesses Subcontracting Plan; Appendix C, Services and Pricing Addendum; Appendix D, Sample Supplemental Agreement; Exhibit 1, Vendor’s Response to RFO DIR-SDD-TMP-091, including all addenda; and Exhibit 2, RFO DIR-SDD-TMP-091, including all addenda; are incorporated by reference and constitute the entire agreement between DIR and Vendor. In the event of a conflict between the documents listed in this paragraph, the controlling document shall be this Contract, then Appendix A, then Appendix B, then Appendix C, then Appendix D, then Exhibit 1, and finally Exhibit 2. In the event and to the extent any provisions contained in multiple documents address the same or substantially the same subject matter but do not actually conflict, the more recent provisions shall be deemed to have superseded earlier provisions.

2. Term of Contract

The term of this Contract shall be three (3) years commencing on the last date of approval by DIR and Vendor. Prior to expiration of the original term, DIR and Vendor may extend this Contract, upon mutual agreement, for up to two (2) optional one-year terms.

3. Service Offerings

Services available under this Contract are limited to those Services described in Appendix C, Services and Pricing Index. Per Seat Pricing listed in Appendix C, Services and Pricing Index, is based upon current Standard Configurations for computers promulgated by DIR. Vendor may price alternate configurations and Customers may order alternate configurations based upon their business needs, however, basic-level services for Asset Tracking, Break/Fix of Vendor owned Equipment and Unwind will be included in the per seat price.

4. Pricing**A. Customer Price**

1) Pricing for services available under this Contract is detailed in Appendix C, Services and Pricing Index. Pricing included in Appendix C, Services and Pricing Index includes the DIR Administrative Fee. Pricing in Appendix C is not-to-exceed pricing.

2) Customers purchasing services under this Contract may negotiate more advantageous pricing or participate in special promotional offers. In such event, a copy of such better offerings shall be furnished to DIR upon request.

3) If pricing for services available under this Contract are provided at a lower price to: (i) an eligible Customer who is not purchasing those services under this Contract or (ii) any other entity or consortia authorized by Texas law to sell said services to eligible Customers, then the pricing in this Contract shall be adjusted to that lower price. This Contract shall be amended within ten (10) business days to reflect the lower price.

B. DIR Administrative Fee

The administrative fee specified in Section 5 below shall not be broken out as a separate line item when pricing or invoice is provided to Customer.

C. Tax-Exempt

As per Section 151.309, Texas Tax Code, Customers under this Contract are exempt from the assessment of State sales, use and excise taxes. Further, Customers under this Contract are exempt from Federal Excise Taxes, 26 United States Code Sections 4253(i) and (j).

D. Travel Expense Reimbursement

Pricing for services provided under this Contract are exclusive of any travel expenses that may be incurred in the performance of those services. Travel expense reimbursement may include personal vehicle mileage or commercial coach transportation, hotel accommodations, parking and meals; provided, however, the amount of reimbursement by Customers shall not exceed the amounts authorized by the current State Travel Regulations. Travel time may not be included as part of the

amounts payable by Customer for any services rendered under this Contract. The DIR administrative fee specified in Section 5 below is not applicable to travel expense reimbursement. Anticipated travel expenses must be pre-approved in writing by Customer. Customer will be invoiced monthly for reimbursable travel costs incurred in the prior month.

E. Changes to Prices

Price decreases shall take effect automatically during the term of this Contract and shall be passed onto the Customer immediately. DIR and Vendor will mutually agree upon other price changes.

5. DIR Administrative Fee

A. The administrative fee to be paid by the Vendor to DIR based on the dollar value of all sales to Customers pursuant to this Contract is three-quarters of one percent (0.75%). Payment will be calculated for all sales, net of returns and credits. For example, the administrative fee for sales totaling \$100,000 shall be \$750.00.

B. All prices quoted to Customers shall include the administrative fee. DIR reserves the right to change this fee upwards or downwards during the term of this Contract, upon written notice to Vendor. Any change in the administrative fee shall be incorporated in the price to the Customer.

6. Notification

All notices under this Contract shall be sent to a party at the respective address indicated below.

If sent to the State:

Sherri Parks, Service Delivery Division
Department of Information Resources
300 W. 15th St., Suite 1300
Austin, Texas 78701
Phone: (512) 475-4700
Facsimile: (512) 475-4759
Email: sherri.parks@dir.state.tx.us

If sent to the Vendor:

Vic Bentley
International Business Machines Corp.
400 W. 15th Street, Suite 1200
Austin, Texas 78701
Phone: (972) 561-8018
Facsimile: (512) 473-8069
Email: vbentley@us.ibm.com

Stan Martin
International Business Machine Corp.
400 W. 15th Street, Suite 1200
Austin, Texas 78701
Phone: (512) 473-8120
Facsimile: (512) 473-8120
Email: smartin@us.ibm.com

7. Sample Supplemental Agreement

Services provided under this Contract shall be based upon the Sample Supplemental Agreement as set forth in Appendix D of this Contract. Customers may negotiate the terms and conditions of a Supplemental Agreement to suit their business needs so long as the Supplemental Agreement terms and conditions do not conflict with this Contract

8. Authorized Exceptions to Appendix A, Standard Terms and Conditions for Services Contracts.

- A. Appendix A, Section 3, General Provisions, D. Assignment is hereby restated in its entirety as follows:

DIR or Vendor may assign the Contract without prior written approval to: i) a successor in interest (for DIR, another state agency as designated by the Texas Legislature), or ii) a subsidiary, parent company or affiliate, or iii) as necessary to satisfy a regulatory requirement imposed upon a party by a governing body with the appropriate authority. Assignment of the Contract under the above terms shall require written notification by the assigning party. Any other assignment by a party shall require the written consent of the other party. Each party agrees to cooperate to amend the Contract as necessary to maintain an accurate record of the contracting parties. Neither DIR nor Vendor will unreasonably withhold consent.

Vendor is permitted to assign its rights to payments under this contract without obtaining DIR's consent; provided, however Vendor shall provide DIR with all necessary information to ensure that the proper parties are reflected in its files so that it may make payments. It is not considered an assignment for Vendor to divest a portion of its business in a manner that similarly affects all of its customers; however, in the event of such a divestiture, IBM shall notify DIR promptly of such action and provide all necessary information and cooperate in the execution of such additional documents as needed by DIR to maintain an accurate record of the contracting parties

- B. Appendix A, Section 4, Contract Fulfillment and Promotion, Subsection A., Service, Sales and Support of the Contract is hereby restated in its entirety as follows:

Vendor shall provide service, sales and support resources to serve all Customers throughout the State. It is the responsibility of the Vendor to sell, market, and promote services available under the Contract. Vendor shall notify Customers of the existence of the Contract. All sales to Customers for services available under the Contract shall be processed through the Contract.

- C. Appendix A, Section 4, Contract Fulfillment and Promotion, Subsection B. Accurate and Timely Contract Information 2) is hereby restated in its entirety as follows:

Vendor represents that the website information specified in the above paragraph will be accurately and completely posted, maintained and displayed in an objective and timely manner. Vendor, at its own expense, shall correct any non-conforming or inaccurate information posted at Vendor's website within ten (10) business days after written notification by DIR.

- D. Appendix A, Section 4, Contract Fulfillment and Promotion, Subsection E., Trade Show Participation is hereby restated in its entirety as follows:

At DIR's discretion, Vendor at the Vendor's expense, may be required to provide a manned booth at no more than two trade shows each State fiscal year sponsored by DIR. DIR will provide Vendor with no less than four months advance notice prior to the date of the show. Vendor must display the DIR logo at all trade shows that potential Customers will attend. DIR reserves the right to approve or disapprove of the location or the use of the DIR logo in or on the Vendor's booth.

- E. Appendix A, Section 4, Contract Fulfillment and Promotion, Subsection G. DIR Cost Avoidance, is hereby restated in its entirety as follows:

As part of the performance measures reported to state leadership, DIR must provide the cost avoidance the State has achieved through the Contract. Upon request by DIR, Vendor shall provide DIR with a detailed report of a representative sample of service sold under the Contract. The report shall contain: service description, list price, price to Customer under the Contract.

- F. Appendix A, Section 5, Purchase Orders, Invoices and Payments, Subsection B., Invoices, 1) is hereby restated in its entirety as follows:

Vendor will invoice Customer monthly for actual Services hours worked, and allowable travel reimbursement expenses if previously authorized by Customer. Invoices shall be submitted by the Vendor directly to the Customer and shall be issued in compliance with Chapter 2251, Texas Government Code. All payments for services purchased under this Contract and any provision of acceptance of such services shall be made by the Customer to the Vendor.

- G. Appendix A, Section 6, Contract Administration, Subsection A., Vendor Contract Administrator 2) is hereby restated in its entirety as follows:

Vendor shall provide a dedicated Contract Administrator whose duties shall include but not be limited to: i) supporting the marketing and management of the Contract, and ii) facilitating dispute resolution between the Vendor and a Customer. Should DIR become dissatisfied with the performance of Vendor's Contract Administrator, DIR may notify Vendor and the parties will convene within ten business days to cooperate in remedying the situation.

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- H. Appendix A, Section 6, Contract Administration, Subsection B., Reporting and Administrative Fees, 2) is hereby restated in its entirety as follows:

Vendor shall electronically provide DIR with a detailed monthly report in the format required by DIR showing the dollar volume of any and all sales under the Contract for the previous month period. The term “sales” shall mean actual sales that have been shipped and invoiced. Reports shall be submitted to the DIR Go DiRect Coordinator. Reports are due on the fifteenth (15th) calendar day after the close of the previous month period. It is the responsibility of Vendor to collect and compile all sales under the Contract from participating Order Fulfillers and submit one (1) monthly report. The monthly report shall include, per transaction: the detailed sales for the period, the Order Fulfller’s company name, if applicable, Customer name, invoice date, invoice number, description, part number, manufacturer, quantity, unit price, extended price, Customer Purchase Order number, contact name, Customer’s complete billing address, and subtotals and totals and other reasonable information as required by DIR. Each report must contain all information listed above per transaction or the report will be rejected and returned to the Vendor for correction in accordance with this section.

- I. Appendix A, Section 6, Contract Administration, Subsection B., Reporting and Administrative Fees, 5)a) is hereby restated in its entirety as follows:

The reports and administrative fees shall be accurate and timely and submitted in accordance with the due dates specified in this section. Vendor shall correct any inaccurate reports or administrative fee payments within three (3) business days upon written notification by DIR. Vendor shall deliver any late reports or late administrative fee payments within three (3) business days upon written notification by DIR. If Vendor is unable to correct inaccurate reports or administrative fee payments or deliver late reports and fee payments within three (3) business days, Vendor must contact DIR and provide a corrective plan of action, including the timeline for completion of correction. The corrective plan of action shall be subject to DIR approval. Such approval shall not be unreasonably withheld.

- J. New Item 5) is hereby added to the end of Appendix A, Section 6, Contract Administration, Subsection C., Records and Audit as follows:

For all other audits except those described in Section 6 C. 1) of the Contract above, the State’s or any third-party’s access to Vendor’s books and records shall not include access to personnel, profit, or internal cost data. In addition, the parties shall mutually agree to what documents and records the State or any third-party shall gain access to, whether it is the State or any third-party accessing such records and/or data.

- K. Appendix A, Section 7, Vendor Responsibilities, Subsection A., Indemnification is hereby restated in its entirety as follows:

1) Acts or Omissions

Vendor shall defend, indemnify and hold harmless DIR and DIR Customers, their

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officers, agents, and employees from and against all third party claims, actions, suits, demands, proceeding, costs, damages and liabilities, including attorneys fees, for which Vendor is legally liable, arising out of, or resulting from any acts or omissions of the Vendor or its agents, employees, subcontractors relating to (i) the claims covered by Patents and Copyrights section, and (ii) personal injury (including death) or damage to real or tangible personal property caused by Vendor or its agents, employees, subcontractors in the execution or performance of the Contract and any Purchase Orders issued under the Contract. Vendor agrees to coordinate defense with the Texas Office of Attorney General, as requested by DIR, but that Vendor shall control such defense and all negotiations relative to the settlement of any such claim which does not require the State of Texas to pay any money, cease using the software or system, except as provided in the Patents & Copyrights section. The State of Texas shall promptly provide Vendor with written notice of any claim which the State believes falls within the covered claims of the Patents & Copyrights section.

2) Patents and Copyrights

a) If a third party claims that Work Products that Vendor provides to Customer infringe that party's patent or copyright, Vendor will defend Customer against that claim at its expense and pay all costs, damages, and attorney's fees that a court finally awards or that are included in a settlement approved by Vendor, provided that Customer:

1. promptly notifies Vendor in writing of the claim; and
2. allows Vendor to control, and cooperate with Vendor in, the defense and any related settlement negotiations, provided that the Vendor shall obtain the consent of the Office of the Attorney General before entering into any settlements that requires DIR to admit liability or make a payment to the third party. Vendor shall have control over the settlement of any monetary issues relating to an infringement action. Vendor agrees that the Office of the Attorney General shall retain control over any issues regarding liability and money damages to be paid by the State and any other issues not relating to indemnification by Vendor.

b) Remedies

If such a claim is made or appears likely to be made, Customer agrees to permit Vendor to enable Customer to continue to use the Work Product, or to modify it, or replace it with one that is at least functionally equivalent. If Vendor determines that none of these alternatives is reasonably available, Customer agrees to return the Work Product to Vendor on its written request. Vendor will then give Customer a credit equal to the amount Customer paid for the Work Product.

This is Vendor's entire obligation to Customer regarding any claim of infringement.

c) Claims for Which Vendor is Not Responsible

Vendor has no obligation regarding any claim based on any of the following:

1. anything Customer provides which is incorporated into a Work Product or Vendor's compliance with any designs, specifications, or instructions provided by Customer or by a third party on Customer's behalf;
2. Customer's modification of a Work Product; or
3. the combination, operation, or use of the Work Products with any product, data, apparatus, or business method that Vendor did not provide, or the distribution, operation or use of the Work Products for the benefit of a third party outside Customer's

organization;

4. infringement by a non-Vendor product or another Vendor program alone.

- L. Appendix A, Section 7, Vendor Responsibilities, Subsection G., Confidentiality, 2) is hereby restated in its entirety as follows:

Under the terms of the Contract, DIR may provide Vendor with information related to Customers. Vendor shall not re-sell or otherwise distribute or release Customer information to any party in any manner. However, DIR and DIR Customers agree to allow Vendor and its subsidiaries to store and use DIR's and DIR Customers' contact information, including names, phone numbers, and e-mail addresses, anywhere they do business. Such information will be processed and used only in connection with our business relationship with DIR or other DIR Customers under this Contract.

- M. Appendix A, Section 7, Vendor Responsibilities, Subsection G., Confidentiality, new Item 3) is added as follows:

Except as set forth in Section 7 G. 2) above, all information exchanged is non-confidential. If either party requires the exchange of confidential information, it will be made under a signed confidentiality agreement.

- N. Appendix A, Section 7, Vendor Responsibilities, Subsection H., Security of Premises, Equipment, Data and Personnel, is hereby restated in its entirety as follows:

Vendor may, from time to time during the performance of the Contract, have access to the personnel, premises, equipment, and other property, including data, files and /or materials (collectively referred to as "Data") belonging to the Customer. Vendor shall use commercially reasonable efforts to preserve the safety, security, and the integrity of the personnel, premises, equipment, Data and other property of the Customer, in accordance with the instruction of the Customer. Vendor shall be responsible for damage to Customer's equipment, workplace, and its contents when such damage is caused by its employees or subcontractors.

- O. Appendix A, Section 7, Vendor Responsibilities, Subsection J, Limitation of Liability is hereby restated in its entirety as follows:

Circumstances may arise where, because of a default on Vendor's part or other liability, DIR or a DIR Customer is entitled to recover damages from Vendor under this Contract.

Regardless of the basis on which the DIR or DIR Customer is entitled to claim damages from Vendor (including breach, negligence, misrepresentation, or other contract or tort claim), Vendor is liable for no more than:

1. payments referred to in the Patents and Copyrights section of this Contract;
2. damages for bodily injury (including death) and damage to real property and tangible personal property; and
3. the amount of any other actual direct damages up to the greater of \$100,000 or the charges (if recurring, 12 months' charges apply) for the Product or Service that is the

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subject of the claim. For purposes of this item, the term "Product" includes Materials, Machine Code, and LIC.

Notwithstanding anything herein to the contrary, Vendor's indemnification liability under this Section shall be considered direct damages within the meaning of the prior sentence and subject to the liability limits set out in that sentence.

This limit also applies to any of Vendor's Subcontractors and Program developers. It is the maximum for which Vendor and its Subcontractors and Program developers are collectively responsible.

Items for Which Vendor is Not Liable

Under no circumstances is Vendor, its Subcontractors, or Program developers, liable for any of the following when suffered by the others even if informed of their possibility:

1. third party claims other than those described in subsections 1 and 2 of this Section;
2. loss of, or damage to, data;
3. special, incidental, or indirect damages or for any economic consequential damages; or lost profits, business, revenue, goodwill, or anticipated savings.

Items for Which DIR or a DIR Customer is Not Liable

Under no circumstances is DIR or a DIR Customer liable for any of the following:

1. third party claims against Vendor for any losses or damages (other than those arising from DIR or a DIR Customer's infringement or violation of Vendor's intellectual property rights, including, but not limited to, DIR or a DIR Customer's violation of its obligations set forth in the Supplemental Agreement, Section 1.1 (Machine Code and Licensed Internal Code) and (License), or DIR or a DIR Customer's infringement or violation of a third party's intellectual property rights); or
2. special, incidental, or indirect damages or for any economic consequential damages (including lost profits or savings), even if DIR or a DIR Customer is informed of their possibility.

- P. Appendix A, Section 8, Contract Enforcement, Subsection B., Termination, Item 3) Termination for Convenience is hereby restated in its entirety as follows:

DIR or Vendor may terminate the Contract, in whole or in part, by giving the other party thirty (30) calendar days written notice. A Customer may terminate a Purchase Order if it is determined by the Customer that Vendor will not be able to deliver product or services in a timely manner to meet the business needs of the Customer by giving Vendor thirty (30) calendar days written notice.

- Q. Appendix A, Section 8, Contract Enforcement, new Subsection D. Warranties, is hereby added as follows:

1) Warranty for Vendor Services

For each Vendor Service, Vendor warrants that Vendor performs it:

- a. using reasonable care and skill; and

- b. according to its current description (including any completion criteria) contained in this Agreement, an Attachment, or a Transaction Document.

2) Extent of Warranty

The warranties will be voided by misuse, accident, modification, unsuitable physical or operating environment, operation in other than the Specified Operating Environment, improper maintenance by Customer, removal or alteration of Product or parts identification labels, or failure caused by a product for which Vendor is not responsible.

THESE WARRANTIES ARE CUSTOMER'S EXCLUSIVE WARRANTIES AND REPLACE ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

3) Items Not Covered by Warranty

Vendor does not warrant uninterrupted or error-free operation of a Product or Service or that Vendor will correct all defects.

Vendor will identify IBM Products that Vendor does not warrant.

Unless Vendor specify otherwise, Vendor provides Materials, non-Vendor Products, and non-Vendor Services **WITHOUT WARRANTIES OF ANY KIND**. However, non-Vendor manufacturers, suppliers, or publishers may provide their own warranties to Customer.

- R. Appendix A, Section 8, Contract Enforcement, new Subsection E, Required Consents, is hereby added as follows:

Customer is responsible for promptly obtaining and providing to Vendor all Required Consents necessary for Vendor to provide the Services described in the Purchase Order. A Required Consent means any consents or approvals required to give Vendor and its subcontractors the right or license to access, use and/or modify (including creating derivative works) the hardware, software, firmware and other products Customer uses, without infringing the ownership or license rights (including patent and copyright) of the providers or owners of such products.

To the extent allowable by Texas Law and Constitution, Customer agrees to indemnify, defend and hold Vendor, its subcontractors and majority-owned subsidiaries, harmless from and against any and all claims, losses, liabilities and damages (including reasonable attorneys' fees and costs) arising from or in connection with any claims (including patent and copyright infringement) made against Vendor, alleged to have occurred as a result of Customer's failure to provide any Required Consents to Vendor.

Vendor will be relieved of the performance of any obligations that may be affected by Customer's failure to promptly provide any Required Consents to Vendor.

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- S. Appendix A, Section 8, Contract Enforcement, new Subsection F, Customer Managed Project, is hereby added as follows:

Vendor will provide Services to the Customer pursuant to Appendix C, Services and Pricing Index, per the scope of effort defined in the mutually executed Supplemental Agreement and incorporated into a Purchase Order. The Customer retains responsibility for the overall management of the project, and the results achieved.

This Contract is executed to be effective as of the date of last signature.

International Business Machines Corporation

The State of Texas, acting by and through the Department of Information Resources

Authorized By: *signature on file*

Authorized By: *signature on file*

Name: Ronald E. Wilt

Name: Cindy Reed

Title: Client Unit Executive

Title: Interim Director of Service Delivery

Date: 6/22/07

Date: 6/26/07

Legal: *signature on file 6/22/07*